

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 95-02191

COUNSEL: NONE

HEARING DESIRED: YES

JUL 31 1998

APPLICANT REQUESTS THAT:

1. His nonselections for promotion beginning with the Calendar Year (CY) 1991B Lieutenant Colonel Board be declared null and void.
2. The Officer Performance Report (OPR) closing 29 April 1991 be declared null and void.
3. The Promotion Recommendation Form (PRF) reviewed by the CY91B Lt Colonel Board be upgraded to a "Definitely Promote" recommendation. In the alternative, he be granted 60 days to obtain additional support to correct the PRF after the tainted OPR is removed from his file.
4. His record be corrected to reflect he was selected for promotion to the grade of lieutenant colonel in the promotion zone by the CY91B Lt Colonel Selection Board.

(By amendment at Exhibit I):

5. The start date for the Air Force Commendation Medal (AFCM) covering the period 9 September 1986 to 16 November 1990, be changed to 1 February 1989, and that the AFCM be upgraded to a Meritorious Service Medal (MSM).
6. The decorations' portion of his record be corrected and he be reconsidered for promotion by Special Selection Board, beginning with the CY91B board.

APPLICANT CONTENDS THAT:

The contested OPR is both an incomplete and unjust portrayal of his performance. Not only are duty accomplishments minimized (or ignored), the report does not fully or accurately portray the impact his performance had upon unit mission accomplishment.

Evidence from his reporting chain clearly proves the contested OPR is not an accurate or just appraisal of his performance during the contested rating period. As a result, his selection record and record of performance were in error when he was

considered for promotion by the CY91B (and later) lieutenant colonel boards.

The top document reviewed by his senior rater for his PRF for the CY91B lieutenant colonel board was the tainted OPR. At the time he was serving in Turkey and there was no way that he could provide his own input into this process. The result is clearly a tainted PRF as it does not fully reflect his performance-based potential. Based on the evidence of his superior performance, request that his PRF for the CY91B board be corrected to reflect award of a "Definitely Promote" recommendation.

The selection boards which considered his file were held in violation of statute and DOD directive. Each violation of statute and directive involved a specific provision designed to afford him a certain element of "protection" by requiring specific procedures to ensure selection boards operate fairly. In his case, the majority consensus of his jury (board members) was never developed, his jury members (board) were never told of findings, and his jury (board members) were never shown the product of their labors (the recommended list). Therefore, request that his nonselections for promotion be set aside.

Had it not been for the tainted OPR, his record would have been competitive for a "Definitely Promote" recommendation and he would have been selected by the original central board. A Special Selection Board (SSB) cannot fairly assess his record for promotion because of the tainted record sampling and the fact that the scoring system itself is arbitrary and capricious. Therefore, request his records be corrected to direct promotion to lieutenant colonel as if selected by the CY91B board.

The decorations portion of his file was incomplete when he was considered for promotion. Specifically, the citation for the MSM, basic award, was missing from the file; the start date on the AFCM should have been 1 February 1989 rather than 9 September 1986, and the AFCM should be upgraded to an MSM; and the MSM (Second Oak Leaf Cluster) covering the period 7 Dec 90 to 13 Dec 91, was not approved until 1994 and was not processed in accordance with the governing regulation.

In support of his request, applicant provided his 13-page statement, with 11 attachments, which included documentation pertaining to award of the Bronze Star Medal on 20 November 1991, covering the period 16 January to 28 February 1991; supporting statements from several senior commanders, a previous rater and a subsequent rater; documentation pertaining to unit awards and wing standardization evaluation, and a document entitled "Illegal Air Force Selection Boards: Documentary Summary."

STATEMENT OF FACTS:

On 17 May 1975, applicant was appointed as second lieutenant, Reserve of the Air Force. He was voluntarily ordered to extended active duty on 18 July 1976. He served on continuous active duty, and he was integrated into the Regular component on 15 March 1985, and progressively promoted to the grade of major.

A resume of applicant's OERs/OPRs follows:

<u>PERIOD CLOSING</u>	<u>OVERALL EVALUATION</u>
28 Feb 77	3-3-3
31 Aug 77	3-3-3
28 Feb 78	2-2-2
28 Jun 78	2-2-2
28 Dec 78	2-x-2
8 Dec 79	1-1-1
8 Jun 79	2-x-2
26 Jul 80	1-x-1
3 Jun 81	Education/Training Report
20 Jan 82	1-X-1
25 Jun 82	1-X-1
25 Jun 83	1-1-1
12 Jun 84	1-1-1
12 Jun 85	1-1-1 (w/LOE)
12 Jun 86	1-1-1
12 Jun 87	1-1-1
12 Jun 88	1-1-1
31 Jan 89	Meets Standards (MS)
30 Sep 89	MS
30 Sep 90	MS
* 29 Apr 91	MS
# 10 Nov 91	MS
** 10 Aug 92	MS
## 17 May 93	MS
*** 17 May 94	MS
17 May 95	MS

* Contested report (see copy at Exhibit B).

- Top report in file when considered and nonselected for promotion by the CY91B Lt Col Board which convened on 2 Dec 91.

** - Top report in file when considered and nonselected for promotion by the CY92B Lt Col Board which convened on 16 Nov 92.

- Top report in file when considered and nonselected for promotion by the CY93A Lt Col Board which convened on 12 Oct 93.

*** - Top-report in file when considered and nonselected for promotion by the CY94A Lt Col Board which convened on 11 Oct 94.

The records reflect applicant received the following decorations:

MSM for outstanding noncombat meritorious serving during the period 15 November 1978 to 5 March 1979, awarded per Special Order GB-10, dated 6 February 1980.

Joint Service Commendation Medal for meritorious service during the period 25 June 1981 to 12 July 1984, awarded per Special Order GB-56, dated 30 July 1984.

MSM (10LC) for outstanding noncombat meritorious service during the period 9 September 1986 to 31 January 1989, awarded per Special Order GB-82, dated 22 August 1989.

AFCM for meritorious service during the period 1 February 1989 to 16 November 1990. (Examiner's Note: The citation in applicant's selection folder reflects the inclusive dates of 9 September 1986 to 16 November 1990. However, the copy of the citation on the microfiche records reflects the dates 1 Feb 89 to 16 Nov 90.)

Bronze Star Medal for meritorious achievement during the period 16 January - 28 February 1991, awarded per Special Order GA-139, dated 20 November 1991.

MSM (20LC) for outstanding noncombat meritorious service during the period 7 December 1990 to 13 December 1991, awarded per Special Order GA-48, dated 11 May 1994.

MSM (30LC) for outstanding service during period 9 January 1992 to 31 July 1996, awarded per Special Order GA-58, dated 19 April 1996.

On 31 July 1996, applicant was honorably relieved from active duty and retired effective 1 August 1996 under the provisions of AFI 36-2303. He was credited with 20 years and 13 days active service for retirement.

AIR FORCE EVALUATION:

The Operations, Selection Board Secretariat, AFMPC/DPPB, provided comments addressing applicant's contentions pertaining to "Defective Selections Boards." DPPB stated this application contains faulty logic, incorrect statements, accusations without merit, directives/statute/regulations taken out of context and is fully unfounded. Their comments, in part, follow.

DPPB disagreed with applicant's contentions that his promotion boards were in violation of Sections 616 and 617, 10 USC, stating Air Force legal representatives have reviewed their procedures on several occasions during the past few years and have determined those procedures comply with the applicable statute and policy.

As to applicant's argument the Air Force has neither developed nor issued standard operating procedures for selections boards, DPPB disagreed stating upon the approval and publishing of DODD 1320.12, 4 Feb 92, all Air Force promotion boards were placed on hold pending a complete rewrite of AFR 36-89, Promotion of Active Duty List Officers. Only after the new AFR 36-89 was approved by the Office of the Secretary of Defense and published 17 Apr 92, did they resume conducting promotion boards.

All Air Force promotion boards comply with DODD 1320.09 and 1320.12 (which superseded 1320.09). Each competitive category competes only within itself, i.e., the chaplain eligibles only compete against other chaplains, and the nurse corps eligibles only compete against other nurse corps eligibles. Never would two different competitive categories compete against each other. Thus, it should be perfectly clear why the board members for each competitive category are permitted to depart after they have completed their responsibilities and do not remain until all other competitive categories have completed their responsibilities. They then consolidate each competitive category results into a single board report for presentation to the Secretary of the Air Force.

The actions/responsibilities of each board president are in compliance with statute and policy.

DPPB disagreed with applicant's contention that an SSB cannot provide a full measure of relief since the benchmark records used for an SSB are a "tainted record sampling." The identification of benchmark records from each selection board is in compliance with governing directives.

Applicant's statement "a majority of the members of the original board never concurred the full below the promotion zone quota should be used" is incorrect. Every board member scoring a given competitive category was involved in the BPZ displacement process that determined whether the full BPZ quota would be used for that competitive category.

Regarding applicant's contention that the SSB scoring system is "arbitrary and capricious" because of possible scoring inversions, it should be noted the numerical scores from the original board have nothing to do with the numerical scores given to the benchmark records by an SSB, only the select/nonselect status of the benchmark records is important. Because the benchmark records are very similar in quality (having come from the same score category of the original board), it is not unusual to have some inversion in the benchmark order of merit (OOM) created by the SSB. Whenever the inversion is of a nature where a nonselect benchmark record receives the highest score by the SSB and the considerer's record receives the same score or even the second highest score, i.e., beats all the select benchmark records, the nonselect benchmark record and the considerer's record are returned to the board members for rescoring. If the

considered's record scores higher than the nonselect benchmark, the considerer will be a select. Regardless of the situation, SSB members are not informed which record is a benchmark record or a considerer record.

The complete evaluation is at Exhibit C.

The AF Evaluation Board Recorder, AFPC/DPPPEB, provided comments addressing applicant's request that his CY91B PRF rating be changed from "Promote" to "Definitely Promote." DPPPEB stated a PRF should mirror the officer's entire record of performance (ROP) and is considered to be an accurate assessment of the officer's performance when it is rendered. The applicant has not provided support from his senior rater or Management Level Review (MLR) president or submitted a new PRF indicating a "Definitely Promote" rating. Lastly, the request to have the OPR closing out 29 April 1991 declared null and void has not been approved. DPPPEB recommended applicant's request be denied; however, if the applicant provides justification as stated above, he should resubmit his request to have his PRF rating changed. (Exhibit D)

The Air Force Management Level Review Recorder, AFPC/DPPPEB, recommended denial of applicant's request that his PRF for the CY91B lieutenant colonel board be upgraded to reflect a "Definitely Promote," stating the applicant was unsuccessful in his request (to the Officer Personnel Records Review Board) to have the OPR closing 29 April 1991 removed; therefore, the PRF should stand. As an alternative to the PRF upgrade, the applicant has petitioned the board for 60 days following removal of the contested OPR to obtain additional support to correct the PRF. Recommend approval of this request if the applicant is successful in his attempts to have the contested OPR removed. (Exhibit E)

The Evaluation Procedures Section, AFMPC/DPPPEP, provided comments addressing applicant's request to remove the OPR closing 29 April 1991 from his records.

DPPPEP stated there are no provisions in the governing regulation that support removing an OPR based on how well previous reports are written. Because of the strong support on behalf of the applicant offered by several highly respected senior officers, DPPPEP contacted the rater of the contested report to discuss the performance assessment of the OPR in question. He (the rater) made the following comments concerning confirmation of whether or not the performance assessment he rendered on applicant was an accurate assessment: "The OPR on [applicant] is considered an accurate performance assessment. I articulated this to Col S--- (Reviewer on OPR) by emphasizing the fact that [applicant] had many strengths and performed outstandingly in several areas; however, when assessing his total performance, he was not one I would recommend for Senior Service School (SSS) or to command a squadron." The rater was then informed of the strong letters of support alluded to above. He indicated that those

recommendations (with which he was familiar) did not alter his view.

In their conclusion, DPPPEP stated a review of the documents provided does not reveal a violation of regulatory provisions or indicate the OPR is technically flawed. Although the applicant has received strong indorsements from several senior officers in his command, the rater—who, in DPPPEP's opinion, is in the best position to accurately assess an officer's performance, expressed beyond a doubt that his performance assessment of the applicant was indeed accurate. Based on these factors, DPPPEP recommended applicant's request to remove the OPR be denied.

The complete evaluation is at Exhibit F.

The Staff Judge Advocate, AFPC/JA, reviewed this application and recommended denial. Their comments, in part, follow.

Regarding the first basis for applicant's claim for relief (defective record), JA concurred with the evaluations submitted by AFPC/DPPPEP and DPPPEB (Exhibits E and F, respectively). As applicant has failed to prove that the OPR in question is incomplete or otherwise inaccurate, there exists no 'taint' to the CY91B PRF that requires correction. JA likewise rejects his argument that the selection boards which considered him were defective.

The bulk of applicant's submission is the latest version of the canned brief attacking the Air Force's promotion system. The author, as a centerpiece of his presentation, continues to want to debate a 1992 AF/JAG legal opinion. In so doing, he seems to insist that that opinion—which was never even written in response to his present argument or the issue he has raised—constitutes the sole Air Force position on the matter. To clarify one more time, the AF/JAG opinion of 26 Feb 92 was never written to respond to the author, and they (and the Air Force) are not relying on it as the sole basis for any response. Indeed, the author himself has hit the nail on the head in his final statement of the narrative of Tab 3, Atch 2 of his "Documentary Summary": Therefore, the AF/JAG opinion is irrelevant to my application for correction of records."

Noting applicant's argument that Air Force promotion boards violate 10 USC 616 and 617, JA stated there is no provision of law that specifically requires each member of a promotion board to personally review and score the record of each officer being considered by the board. The House Armed Services Committee Report (97-141) that accompanied the Defense Officer Personnel Management Act (DOPMA) Technical Corrections Act (PL 97-22) specifically references panels as a type of administrative subdivision of selection boards. Consequently, it is clear that at the time DOPMA was enacted, Congress was certainly aware of the existence of promotion board panels and expressed no problem with them. Furthermore, language of 10 USC **616(a) and (c)** (the

recommendation for promotion of officers by selection boards), not just 617(a) (the certification by a majority of the members of the board), speaks to the corporate board and not to individual members. In essence, a majority of the board must recommend an officer for promotion and each member is required to certify that the corporate board has considered each record, and that the board members, in their opinion, have recommended those officers who "are best qualified for promotion." The members are not required to reach this point through an individual examination of every record, although they may do so. Rather, based on their overall participation in the board's deliberations, and the fact that the process involves the random assignment of officer selection records to panels to achieve relatively equal quality and procedures to insure that the quality of the records of those officers recommended for selection is essentially identical, the members are in a position to honestly certify that the process in which they participated properly identified, based on the record before them, those officers who were best qualified for promotion. In JA's opinion, that is enough to assure compliance with all the statutory requirements.

After citing the relevant portion of DODD 1320.12, JA stated applicant's argument that the Air Force promotion board was illegal because the Air Force convened a single board consisting of panels rather than convening separate boards as required by the DOD Directive, is without merit. It is clear that the directive's purpose in requiring separate boards for each competitive category is to insure that these officers compete only against others in the same competitive category—to assure fairness and compliance with Title 10, Chapter 36 (particularly Section 621 requirements). In truth, notwithstanding the Air Force's competitive category panels, which are convened concurrently as permitted by the Directive, fully accomplish this stated purpose; i.e., members of each competitive category compete within their respective panel only against other officers of that same category. Thus, the panels **operate** as separate boards for purposes of the DOD Directive. More importantly, they fulfill all the requisite statutory and regulatory requirements.

JA disagreed with applicant's argument as error the autonomy of the panel operation and board president in the Air Force promotion process, in particular, his argument that the board president's duties in the Air Force process violates DOD Directive 1320.12, Section H, para 1. The duties prescribed for board presidents by Air Force directives do require the president to perform several critical duties relative to board scoring. Those duties do not, however, in any manner, constrain the board from recommending for promotion the best qualified among the fully qualified officers being considered. Applicant has offered no proof that the president of this or any Air Force selection board has ever acted contrary to law or regulation. In the absence of evidence to the contrary, the board president and

other members of the board are entitled to the presumption that they carried out their duties and responsibilities properly and according to law.

In his next assignment of error, applicant claims that his nonselection cannot be remedied by SSB because (1) the benchmark records that would be used in an SSB are invalid because the original promotion boards that rendered them were illegal, and (2) scoring procedures used by Air Force SSBs are arbitrary and capricious. JA stated they cannot address these issues without first reiterating their strong belief that applicant has not provided a timely or meritorious application warranting the need for any relief. As for the merits of these claims, JA concurs with DPPB (Exhibit C) in its advisory. In JA's opinion, the Air Force's SSB procedure fully comports with the 10 USC 628(a)(2) requirement that an officer's "record be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him." The burden is on the applicant to prove otherwise, and he failed to do so.

As to the request for direct promotion, both Congress and DOD have made clear their intent that errors ultimately affecting promotion should be resolved through the use of SSBs. Air Force policy mirrors that (AFR 36-89, para 33a). Moreover, JA has repeatedly agreed with AF/JAG (see OpJAGAF 1994/17) that the AFBCMR is not in the appropriate position to grant a direct promotion-that in promotion matters, the Board's statutory authority should be limited to correcting military records which may have affected the promotion process, and recommending SSB consideration in appropriate cases. The United States Court of Federal Claims concurs in this, *Finkelstein v. United States*, 29 Fed.Cl.611(1993). Otherwise, the AFBCMR-which is not compromised in accordance with 10 USC 612 and has no basis for comparing an applicant's record with those of his competitors-would be essentially usurping the statutory power of promotion boards.

The complete evaluation is at Exhibit G.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant restated his contentions that the contested OPR is both an incomplete and unjust portrayal of his performance and, as a result, his record was tainted during the PRF process. He therefore requests that the PRF be corrected to reflect award of a "Definitely Promote" recommendation for the CY91B lieutenant colonel board.

He also reiterated his contentions that the selection boards which considered his file for promotion were in violation of the law, directives and regulation. He further restated his

contention that an SSB cannot fairly assess his record for promotion.

Applicant further contends that the decorations portion of his file was clearly in error when he was considered at the CY91B, CY92 and **CY93** lieutenant colonel boards. Specifically, the citation for his MSM, basic award, was not posted in his file although it was printed on the selection brief. As a result, his file was incomplete as this document recognized several of his unique duty achievements.

Two other problems are apparent in the decorations portion of his folder. First, the citation for the AFCM should reflect "from 1 February 1989 to 16 November 1990" instead of stating on 9 September 1986. He was not assigned to the 1st S--- Wing until 1 February 1989. This is a minor administrative correction. However, it would be more appropriate to not only correct the dates of this award but also upgrade it to a MSM. A review of his officer performance reports during this time will clear any doubts as to his worthiness of this award. Second, the MSM [Second Oak Leaf Cluster, covering the period 7 Dec 90 to 13 Dec 91] was not approved until 1994. If the award had been processed as required by regulation, this document could have been in his file for his first consideration and definitely be in his file for his subsequent considerations for lieutenant colonel. This citation was not posted until after the 1994 lieutenant colonel board.

Applicant contends that the evidence proves that his record was defective when considered by the original **CY91B** and later lieutenant colonel boards and the **CY91B** and later MLEBs. As a result of a tainted file, he was not able to compete for a "Definitely Promote" in the recommendation process or at the central board as all considerations were all based upon a faulty record.

In support of his request, applicant provided his 25-page response to the advisory opinions, with a copy of the contested AFCM citation and a proposed upgraded citation, and a AFPC/JA and AF/JAG comparison chart. (Exhibit I)

ADDITIONAL AIR FORCE EVALUATION:

The Recognition Programs Branch, AFPC/DPPPPRA, provided comments addressing applicant's request pertaining to the **AFCM**. DPPPPRA stated applicant has not offered any evidence that he applied through administrative channels to have the start date of the AFCM changed from 9 Sep 86 to 1 Feb 89. Nor has he furnished any documentation to substantiate that his AFCM should have been submitted as a recommendation for an MSM or evidence that he attempted to have the decoration upgraded through administrative channels. (Exhibit J)

The Evaluation Programs Branch, AFPC/DPPPE, reviewed applicant's response to the advisory opinions and found no evidence that the contested OPR is flawed. Therefore, their original recommendation (Exhibit F) to deny this request still stands. DPPPE stated that although the applicant has submitted supporting documentation from general officers above his senior rater, they believe the evaluators (rater/senior rater) on the OPR in question were in the best position to make an assessment of the applicant's performance. Unless there is substantiated evidence that violates the intent and principles of AFR 36-10, the OPR in question is considered an accurate assessment at the time it was made a matter of record. (Exhibit K)

The Operations, Selection Board Secretariat, stated a comparison of applicant's response to the advisory opinions with the original application reveals no new meaningful information. Rather, the same opinions, accusations and interpretations are merely restated. Therefore, their previous advisory (Exhibit C) is still valid. (Exhibit L)

The Senior Attorney-Advisor, AFPC/JA, reviewed applicant's rebuttal to the advisory opinions and recommended the application be denied stating the applicant has failed to present relevant evidence of any error or injustice warranting relief. JA's comments, in part, follow.

In JA's opinion, they have satisfactorily addressed applicant's arguments that the Air Force's promotion system operates in violation of federal law and DOD Directive in their earlier advisory (Exhibit G). Nevertheless, they are commenting on several points made in applicant's most recent submission. First, the author misunderstands JA's view with regard to the 1992 AF/JAG opinion. They have never rejected the AF/JAG opinion or the rationale expressed therein; rather, they have simply never relied on it as the total "Air Force position" on the subject. It is in that sense, and that sense alone, that JA considers the 1992 opinion irrelevant to the applicant's appeal. Indeed as pointed out by the author of applicant's rebuttal, they agree with the AF/JAG opinion-but only as far as it goes. That is the point. That opinion was not written in response to the author's arguments and was therefore never intended to address all of the author's allegations. In particular (as the author himself has emphasized over and over again), that opinion did not specifically address Section 616 of Title 10. The opinions expressed in the AFPC/JA advisories, on the other hand, have been written directly in response to the author's various canned briefs. Although they encompass the AF/JAG rationale, they have extended them to address the Section 616 argument and otherwise modified each slightly to better explain their position in light of the author's concerns. JA did not find it necessary to further address in more detail some of the specific points urged by the author in this case. JA stands by its earlier advisory (at Exhibit G).

JA stated the quotation offered by the author, which he excerpted from an order dated January 19, 1996, in the case of *Small v. United States*, No. 94-618C, was taken out of context and is clearly misleading. The judge in that order prefaced his remarks by stating that the court found itself in need of additional information in order to properly evaluate the arguments the plaintiff had raised regarding the lawfulness of the Air Force promotion process. Following the language quoted by the applicant, the judge described his quandary with regard to a problem he perceived was possible in the Air Force panel system, and he concluded his description of his concerns by stating:

Given the above described problem, the question that needs to be answered is whether the Air Force is cognizant of the problem its selection mechanics present and, if so, how the problem is addressed. What steps does the Air Force take, following the identification of each panels list of recommended promotees, to overcome the "promotion error" that the panel system gives rise to?

In response to that order, the United States Department of Justice filed a brief and declarations explaining why the judge's concern does not constitute an error or problem and detailing the safeguards built into the Air Force system. In their opinion, these documents should fully satisfy the judge and resolve his concerns.

Noting that the author of the rebuttal stated that mention of the reference to panels in the DOPMA Technical Corrections Act was an attempt to mislead the Board, JA stated they have never maintained that the mention of panels in the legislative history constituted an exhaustive discussion or unequivocal indorsement of the Air Force promotion system. JA believes that that language constitutes a recognition by Congress that the use of panels as a general methodology was acknowledged and approved. Given the fact that at the time this language was adopted, the Air Force was the only service using a true panel system. JA does not believe it is unreasonable to conclude that this language expressed on the part of Congress no major objection to the system utilized by the Air Force. Even if such a conclusion were not true, however, they have nevertheless provided in their previous advisory (Exhibit G) a complete rationale to support the panel system used by the Air Force.

With regard to the duties of the board president in the Air Force promotion system, the contentions offered by the author of the applicant's rebuttal letter are utterly without merit. The applicant has offered absolutely no evidence that the president of this applicant's promotion board or the president of any other Air Force promotion board ever acted contrary to law, DOD Directive, or Air Force regulation. The duties prescribed for

the president of an Air Force board are entirely within the law and governing directives, and the board president is sworn to uphold those duties-which include the fact that he or she must take no action to determine any matter that would constrain the board from recommending for promotion those officers best qualified to meet the needs of the service.

Even if one were to agree with applicant's specious arguments alleging the violation of governing directives by Air Force officials charged with management of the promotion system, it does not follow that the remedy for such behavior would-or should-include this applicant's promotion. Applicant has failed to present any evidence whatsoever that the systematic errors he claims were responsible for his promotion nonselection.

The complete evaluation is at Exhibit M.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

Applicant requests that the board dismiss all the advisory opinions provided on his case. He stated that since filing his initial rebuttal, he queried AFPC for various documents that were relevant to his petition. Included in his request were documents reflecting all aspects of the alleged AFPC conversation with his former rater and other evaluators, documents reflecting various claims the Air Force has made regarding the promotion process. What he found, however, was the deliberate destruction of information and confirmation the key elements of all the staff advisories were not based on fact.

Applicant reiterated his contentions that the contested OPR should be removed from his records and that the tainted OPR tainted the promotion recommendation process.

Applicant reaffirmed his request that the AFCEM citation should be amended to reflect "from 1 February 1989 to 16 November 1990." He also stated that AFPC has not commented on the fact that his MSM for 1991 should have been in his file long before the 1994 lieutenant colonel board. The dates in this report are also in error and should be corrected although AFPC has provided no comment on this issue. Applicant requests that the board correct the decoration portion of his file and grant him SSB consideration.

Applicant noted that AFPC has failed to comment further on the issue of selection board compliance with statute and directive which is actually quite simple and not an arcane legal debate. He provided additional comments contending that the selection boards were in violation of statute and DOD Directive and cited various court decisions in support of his appeal. He also reiterated his request for direct promotion arguing that an SSB cannot fairly assess his record for promotion.

Applicant's 11-page response, with attachments, is at Exhibit O.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting removal of the OPR closing 29 April 1991 from applicant's records. It appears that applicant believes that the contested report is an incomplete and unjust portrayal of his performance. He also states that the report is not consistent with his previous reports. We note the supporting documentation submitted with this appeal and note the disagreement these individuals have with the contested report. However, these individuals were not in the position to observe applicant's performance during the entire period. While the applicant may disagree with the rater's assessment, this is not a sufficient basis upon which to conclude that the report is inaccurate. In addition, we note that the applicant has failed to show that the rater or additional rater were biased in their assessments of his performance. Applicant notes that the Air Force stated that they contacted the rater and he (rater) indicated the report in question was an accurate assessment of his performance. The applicant appears to be questioning this and notes that the Air Force does not have a statement from the rater. This Board took note of the Air Force's comments; however, these comments are not the reasons we concluded that the report should not be removed from applicant's records. Applicant, based on the evidence of record, has not shown that the individuals who were responsible for assessing his performance rendered an inaccurate or unjust report during the period in question. In view of the above, we do not recommend voidance of the contested report. Based on this finding, applicant's request pertaining to the PRF for the CY91B selection board is a moot issue. Applicant's allegations concerning the legality of the promotion boards are noted; however, the detailed comments provided by the appropriate Air Force offices more than adequately address these issues. Therefore, we agree with the comments of the Air Force and adopt the rationale express as the basis for our conclusion that the applicant failed to sustain his burden of establishing the existence of either an error or injustice in regard to selection board process.
4. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting upgrading of the AFCM for the period 9 September 1986 to 16 November 1990 to an MSM. We note that the applicant has

not submitted sufficient documentation showing that the AFCM should have been submitted as an MSM. Without evidence to support upgrading of the AFCM, applicant's request is not favorably considered.

5. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice warranting reconsideration of the applicant's record for promotion to the grade lieutenant colonel by Special Selection Boards (SSBs) for the CY91B through CY94A selection boards. Applicant's records were not complete and up to date when considered for promotion by the selection boards in question. In this respect, it appears that the citation accompanying the award of the MSM awarded in 1979 was missing; the MSM for the period 7 December 1990 to 13 December 1991 appears to have been delayed due to administrative reasons and not approved until 1994; and, the start date of the AFCM for the period 9 September 1986 to 16 November 1990 appears to be incorrect as the applicant was not assigned to the organization until 1 February 1989. Based on these corrections and in view of the fact that the selection boards in question did review an inaccurate record which served to deprive the applicant of promotion consideration on a fair and equitable basis, we believe that his corrected record should be considered for promotion to lieutenant colonel by SSBs for the selection boards in question.

6. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice concerning applicant's request to be promoted to the grade of lieutenant colonel through the correction of records process. In this regard, we observe that officers compete for promotion under the whole person concept whereby awards and decorations are but one of many factors carefully assessed by selection boards. In addition, an officer may be qualified but, in the judgment of a selection board vested with discretionary authority to make the selections, may not be the best qualified of those available for the limited number of promotion vacancies. Therefore, we believe that a duly constituted selection board applying the complete promotion criteria is in the most advantageous position to render this vital determination, and that its prerogative to do so should only be usurped under extraordinary circumstances.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that the start date of the Air Force Commendation Medal (AFCM) for the period 9 September 1986 to 16 November 1990 be changed to 1 February 1989.

It is further recommended that his records, to include the citation accompanying the award of the Meritorious Service Medal


awarded in 1979 and the Meritorious Service Medal for the period 7 December 1990 through 13 December 1991, be considered for promotion to the grade of lieutenant colonel by Special Selection Boards for the Calendar Years 1991B through 1994A Central Lieutenant Colonel Boards.

The following members of the Board considered this application in Executive Session on 15 December 1997, under the provisions of AFI 36-2603:

Mr. Charles E. Bennett, Panel Chair
 Mr. John L. Robuck, Member
 Mr. Gregory H. Petkoff, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 3 Jul 1995.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFMPC/DPPB, dated 25 Sep 1995. ✓
- Exhibit D. Letter, AFPC/DPPPEB, dated 13 Nov 1995. ✓
- Exhibit E. Letter, AFPC/DPPPEB, dated 17 Nov 1995. ✓
- Exhibit F. Letter, AFMPC/DPPPEP, dated 27 Dec 1995. ✓
- Exhibit G. Letter, AFPC/JA, dated 4 Jan 1996. ✓
- Exhibit H. Letter, AFBCMR, dated 29 Jan 1996.
- Exhibit I. Applicant's 25-Page Response, dated 29 Mar 1996.
- Exhibit J. Letter, AFPC/DPPPEA, dated 26 April 1996. ✓
- Exhibit K. Letter, AFPC/DPPPE, dated 10 May 1996. ✓
- Exhibit L. Letter, AFPC/DPPB, dated 17 May 1996. ✓
- Exhibit M. Letter, AFPC/JA, dated 31 May 1996. ✓
- Exhibit N. Letter, AFBCMR, dated 10 Jun 1996.
- Exhibit O. Applicant's 11-Page Response, dated 15 Aug 1996.



CHARLES E. BENNETT
 Panel Chair